Supreme Court, U.S.
FILED

94 613 OCT - 3 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

IVRIN BOLDEN, JR.,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

ANSEL MARTIN STROUD, III
Counsel of Record

BLANCHARD, WALKER, O'QUIN & ROBERTS
(A Professional Law Corporation)
1400 Premier Bank Tower
P. O. Drawer 1126
Shreveport, Louisiana 71163-1126
(318) 221-6858

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

58 pp

QUESTIONS PRESENTED

I. Is it a violation of the collateral estoppel component of the Double Jeopardy Clause to subject a citizen to a perjury prosecution for denial of a murder after acquittal of the substantive charge?

   A. Does the doctrine of collateral estoppel allow for exception when the state produces new and additional evidence not available to it during the original trial that defendant testified falsely under oath?

   B. Does the doctrine of collateral estoppel apply to situations such as perjury allegedly committed at the trial of the substantive offense?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

CONCLUSION 17

APPENDIX

APPENDIX A ..... App. 1

APPENDIX B ..... App. 26

APPENDIX C ..... App. 28

APPENDIX D ..... App. 29

APPENDIX E ..... App. 31

APPENDIX F ..... App. 35

TABLE OF AUTHORITIES

Page

CASES

Ashe v. Swenson, 397 U.S. 436 (1970) ..... *passim*

Briddle v. Illinois, 450 U.S. 986 (1981) 13

Bullington v. Missouri, 451 U.S. 430 (1981) 2

Commonwealth v. Hude, 425 A.2d 313 (Pa. 1980) ...10, 15

Commonwealth v. Peluso, 393 A.2d 344 (Pa. 1978) 14

Harris v. Washington, 404 U.S. 55 (1971) 15

Sealfon v. United States, 332 U.S. 575 (1948) 11

State v. Bolden, 639 So.2d 721 (La. 1994) 1, 7

Turner v. Arkansas, 407 U.S. 366 (1972) 12

United States v. Sarno, 596 F.2d 404 (9th Cir. 1979) 10

United States v. Sousley, 453 F.Supp. 754 (W.D. Mo. 1978) 12

Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972) 14

CONSTITUTIONAL PROVISION

U.S. Const. amend V 2

STATUTE

La.R.S. 14:123 3

No. _____

In The

Supreme Court of the United States

October Term, 1994

IVRIN BOLDEN, JR.,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Louisiana in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported as *State v. Bolden*, at 639 So.2d 721 (La. 1994) and is included in the Appendix at App. A1-24. The opinion of the Court of Appeal, Second Circuit, State of Louisiana has not been reported and is included in the Appendix at App. B26-27. The ruling of the Fourth Judicial District

Court, Parish of Ouachita, State of Louisiana is also included at App. C28.

JURISDICTION

The judgment of the Supreme Court of Louisiana (App., *infra*, A1-24) was entered on July 5, 1994 and became final fourteen days thereafter. (App., *infra*, A25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Although further proceedings may take place in the state court, the judgment of this state's highest court rejecting petitioner's double jeopardy claim is "final" within the meaning of this section. *Bullington v. Missouri*, 451 U.S. 430, 437, n.8, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

La.R.S. 14:123 states:

Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to a matter material to the issue or question in controversy.

It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

STATEMENT OF THE CASE

Ivrin Bolden, Jr. was indicted by a Ouachita Parish grand jury for the murder of Brenda Spicer. He was tried by a jury of his peers and acquitted. During the trial, Mr. Bolden took the stand and vehemently denied any involvement in the murder. Now, Mr. Bolden has again been brought before the bar of justice to face allegations concerning the murder of Ms. Spicer. But the charge is not murder; it is perjury. Though the formal charge is different, the state nevertheless seeks to relitigate that which it presented to the initial jury. Fundamental protections accorded by the Constitution should bar this effort.

At the murder trial, the state relied exclusively upon circumstantial evidence. There was no eyewitness to the

crime. The state's theory of guilt was outlined in the opening statement of the prosecutor. (App., *infra,* E31-34). The prosecutor told the jury that the evidence would establish, among other things, that on the date of the murder, Ivrin Bolden lured Brenda Spicer to a mini-storage warehouse rented by Bolden and his girl friend, Joel Tillis, and there killed her. The motive, so the argument ran, was jealousy. Bolden was very resentful of the close relationship that had developed between Ms. Spicer and Ms. Tillis. The prosecutor further told the jury that the evidence would show that Bolden, in order to create an alibi, attended a basketball game where he would be clearly visible and seen by others. The prosecutor opined that the evidence would show that Bolden, at half-time of the game, returned to the mini-warehouse, retrieved the body of Ms. Spicer and took it to a nearby dumpster where he disposed of it. He then returned to the game. (App., *infra,* E33).

This theory was vigorously attacked by the defense. Bolden, as mentioned above, took the stand and denied each contention of the state's case. Specifically, he denied luring Ms. Spicer to the warehouse, he denied having any physical contact with her at the warehouse, and he denied killing her.

In her rebuttal argument, the prosecutor focused upon the issue of Mr. Bolden's credibility. She stated:

> Ivrin took an oath to tell the truth, he swore, raised his hand like everybody else did, he said I'm going to tell the truth, nothing but the truth and the whole truth, but did he tell you the whole truth *or didn't he lie about some things?*

. . .

> *He's already taken an oath, he's violated that oath, he's told you two lies.* So when he says, "I didn't kill Brenda Spicer," why isn't he violating his oath a third time? When he says, "I didn't rape Brenda Spicer," why isn't he violating his oath a fourth time. *He is, he's lying to you all.* . . .

(App., *infra,* F36-37). (Emphasis added).

The jury unanimously acquitted Bolden, rejecting the state's contention of Bolden's guilt.

After his acquittal, Mr. Bolden and Ms. Tillis moved to Memphis, Tennessee. In 1990, Ms. Tillis disappeared and her body subsequently was found in Arkansas. Though a suspect in her disappearance, Mr. Bolden was not arrested by either Arkansas or Tennessee authorities. He then moved to New Jersey.

Approximately two years later, Bolden was summoned to the Burlington County Prosecutor's Office in New Jersey in connection with a complaint he had filed against a Jennifer Spurlock. However, after he arrived at the office, authorities quickly turned their attention to the Tillis disappearance. After extensive questioning, Bolden allegedly confessed to killing not only Joel Tillis, but also to the murder of Brenda Spicer.

Mr. Bolden was indicted by a Memphis, Tennessee, grand jury for the first degree murder of Ms. Tillis. Pursuant to a plea agreement, he entered an *Alford* plea to a reduced charge of involuntary manslaughter and received an agreed to sentence of ten years. While in

custody of the Tennessee authorities, the State of Louisiana filed a detainer against Mr. Bolden. He was extradited to Ouachita Parish to stand trial for perjury allegedly committed while testifying at his murder trial. The bill of information charged that Bolden did:

> On or about March 11, 1988
>
> Ct. 1 – Intentionally and knowingly commit perjury after being sworn as a witness at trial of the matter styled State of Louisiana v. Ivrin Bolden, Jr., No. 45434, Fourth Judicial District Court, Ouachita Parish, Louisiana, a prosecution for which he was being tried for the murder of one Brenda Spicer by testifying in response to questions concerning whether he had physical contact with and/or killed Brenda Spicer, a matter material to the issue or controversy in question.

(App., *infra*, D29-30).

On September 4, 1992, Bolden appeared with counsel for arraignment and entered a plea of not guilty to the charge. Several motions were filed, including a motion to quash on the basis of collateral estoppel. A hearing on all motions was held in Monroe, Louisiana, on December 14, 1992. On April 26, 1993, Judge Ingram denied the motion to quash without comment. (App., *infra*, C28).

A writ for supervisory review was filed with the Court of Appeal, Second Circuit, State of Louisiana, and on June 17, 1993, the writ was denied with the following cursory statement:

WRIT DENIED

> None of the controlling cases cited by applicant concern a perjury defendant who, after testifing [sic] that he did not commit a previous offense and being acquitted, subsequently admitted that indeed he committed the acquitted-for crime. Even a previous determination of credibility should not foreclose (under the double jeopardy clause and included collateral estoppel doctrine) a perjury prosecution if, at the latter trial, the state produces new and direct evidence that defendant lied under oath at his first trial, thus permitting the trier of fact to conclude beyond a reasonable doubt that perjury transpired.
>
> Moreover, applicant will have an adequate remedy on appeal in the event of conviction.

(App., *infra*, B26-27).

An application for supervisory writs was then filed with the Louisiana Supreme Court on July 15, 1993. On December 20, 1993, that court granted writs and set the matter for argument. *State v. Bolden*, 629 So.2d 1155 (La. 1993).

The Supreme Court of Louisiana, in a 5-2 decision, affirmed the judgment of the lower courts. *State v. Bolden*, 639 So.2d 721 (La. 1994). (App., *infra*, A1-24). While finding that *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) controlled the issue, the majority created an exception to application of the principle of collateral estoppel when the state, "has obtained new evidence not available to it during the original trial that defendant testified falsely under oath." (App., *infra*, A12). The majority further suggested in dicta that *Ashe* "was not

meant to apply to situations such as perjury committed at the trial of the substantive offense." (App., *infra*, A6, n.4). Yet, because of the exception created by the majority when the perjury prosecution is premised upon evidence not available at the first trial, the majority declined to adopt this rationale absent "more explicit guidance from [this] Court." (App., *infra*, A6-7, n.4). An application for rehearing was not filed, and that ruling has now become final. (App., *infra*, A25). Trial is set to commence in Alexandria, Louisiana, on January 17, 1995.[1]

It is from this decision, that effectively vitiates the doctrine of collateral estoppel when the state "has obtained new evidence not available to it at the first trial," that petitioner now seeks relief. Moreover, judicial intervention at this stage is essential in order that petitioner may avoid the very danger against which the Double Jeopardy Clause was designed to protect; i.e., a second trial.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW THAT ALLOWS A PERJURY PROSECUTION AFTER ACQUITTAL OF THE SUBSTANTIVE CHARGE RAISES IMPORTANT AND UNRESOLVED ISSUES CONCERNING THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE.

The State of Louisiana attempts to litigate for the second time the alleged involvement of Bolden in the

[1] Pursuant to the granting of petitioner's request for change of venue, trial has been moved from Monroe to Alexandria, Louisiana, which is located approximately 125 miles from the city of Monroe.

murder of Brenda Spicer. Petitioner did not testify falsely at his murder trial unless he did, in fact, kill Spicer. Yet, his acquittal of this murder renders it constitutionally impermissible under *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) again to litigate this fact "between the same parties in any future lawsuit." *Id.*, 397 U.S. at 443. Obviously, the perjury trial can not proceed absent consideration of the very evidence rejected by the jury in its acquittal of Bolden.

The only issue in dispute for the jury to decide in the murder case was whether Bolden killed Ms. Spicer. The allegations of the pending bill of information center upon testimony the petitioner gave at trial which, in direct conflict with the theory advanced by the state, denied that he was in any form or fashion involved in the murder.

The first trial was a circumstantial evidence case in which the state called approximately 37 witnesses and introduced approximately 66 items of evidence. It attempted through this evidence to establish that Bolden was jealous of Brenda Spicer's relationship with his girl friend, Joel Tillis. This jealousy, so the argument ran, led him to the murder of Spicer. The state's theory, as outlined in its opening, was that Bolden lured Brenda Spicer to a mini-warehouse and there killed her before a basketball game. He attended the game, according to the state, to create an alibi. (App., *infra*, A33).

The defense denied this theory, arguing through its witnesses, that Bolden was not guilty of the charge. A review of the trial testimony thus reflects the not unusual

situation of two versions of the event in total and irreconcilable conflict. Indeed, this conflict was implicitly acknowledged by the very blunt rebuttal argument of the prosecutor, when she branded Bolden a liar. (App., *infra*, F35-36).

If the jury at the first trial had believed the state's argument, it would necessarily have been required to reject the petitioner's testimony that he did not murder Brenda Spicer. When the jury returned a not guilty verdict, it, in effect, rejected the argument that Bolden violated his oath to tell the truth.

Under *Ashe* and its progeny, this Court should likewise reject the apparent "hypertechnical and archaic approach" to the doctrine of collateral estoppel advanced by the Supreme Court of Louisiana. In the majority opinion, it is asserted:

> Having reviewed the record, we find that the jury decided that the state failed to prove beyond a reasonable doubt that defendant murdered Brenda Spicer. Clearly, the doctrine of collateral estoppel bars the state from relitigating the issue of whether defendant murdered Spicer. *However, it is arguable whether the jury necessarily decided the issue of whether defendant was telling the truth when he testified under oath that he did not kill Brenda Spicer or have physical contact with her.* This was not a situation where the jury was presented with two conflicting versions of the facts and forced to determine the veracity of one over the other. *Cf. United States v. Sarno*, 596 F.2d 404 (9th Cir. 1979); *Commonwealth v. Hude*, 492 Pa. 600, 425 A.2d 313, 321 (1980). The state presented no eyewitness testimony contradicting defendant's assertions that he did

> not kill Spicer or have physical contact with her. Rather, the state's case was based on circumstantial evidence showing that defendant had the motive and opportunity to kill Spicer.
>
> Of course, in any case where the defendant has testified and been acquitted, it could be said that the jury has passed on his credibility and found him truthful, and a subsequent prosecution for perjury should be barred. However, even assuming that defendant's credibility was necessarily decided by the jury, we find that under the unique circumstances of this case, the doctrine of collateral estoppel does not bar defendant's prosecution for perjury.

(App., *infra*, A11-12). (Emphasis added and in the original).

The implication that the ultimate issues in the former and contemplated proceeding could very well be different, ignores one of the most significant principles of *Ashe*. The rule of collateral estoppel in criminal cases is not to be applied "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444.

When there is a general verdict of acquittal, the trial judge in a subsequent trial must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* (Footnote omitted). *Ashe* also reiterated the teaching of *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180 (1948), that the inquiry "must be set in a practical frame and *viewed with*

an eye to all the circumstances of the proceedings." Ashe, 397 U.S. at 444. (Emphasis added).

To suggest that it is arguable whether the jury necessarily decided the issue of credibility completely ignores the realities of the theory advanced by the state at the murder trial. As stated in *United States v. Sousley,* 453 F.Supp. 754 (W.D. Mo. 1978):

> Application of principles approved in *Ashe* forecloses unrealistic and artificial speculation about some *far-fetched theory upon which the jury might have based its verdict of acquittal. Ashe* requires a realistic inquiry into how a rational jury would consider the evidence presented in the particular case in which it rendered its verdict.

Id. at 762. (Emphasis added).

Indeed, in *Turner v. Arkansas,* 407 U.S. 366, 369, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972), this Court expressly rejected the state's theory of what "the jury might have believed" in reaching its verdict of acquittal. Applying the logic of *Turner,* had the jury disbelieved Bolden, it would have almost certainly had to have returned a verdict of guilty. The only logical conclusion is that the jury found Bolden to be credible, thus negating the possibility of a constitutionally valid conviction for perjury.

In sum,

> [A] necessary fact to sustain a perjury conviction – [that Bolden killed Brenda Spicer] – was conclusively rejected at the [murder] trial. This conclusion is entitled to collateral-estoppel effect. . . . Any further prosecution of the perjury [charge] would negate the beneficial effect

> of the factfinding at the [murder] trial to which [Bolden] is constitutionally entitled.

Briddle v. Illinois, 450 U.S. 986, 101 S.Ct. 1527, 67 L.Ed.2d 823, 824 (1981) (Brennan, J., dissenting).

A realistic and rational application of the rule announced in *Ashe* requires that the motion to quash on the basis of collateral estoppel be granted.

A. The Creation Of An Exception To *Ashe* Upon The Discovery Of New Evidence Violates The Express Command Of This Court That A Prosecutor May Not Refine His Presentation In Light Of The Turn Of Events At The First Trial, And Is In Further Conflict With The Supreme Court Of At Least One Other State.

The rationale of the majority opinion is puzzling. While finding that "the doctrine of collateral estoppel bars the state from relitigating the issue of whether defendant murdered Spicer," (App., *infra*, A11), it is exactly this issue that petitioner will be forced to confront in the proposed perjury prosecution. As set forth in Justice Watson's succinct dissent, any "conviction of perjury would necessitate a finding of guilt on a charge of which [Bolden] has been acquitted." (App., *infra*, A15).

However, the majority creates an exception in an effort to avoid the collateral estoppel bar. In amazing logic, the majority found that when the state produces new evidence, it may proceed to try the defendant for perjury, even though such a trial will, of necessity, require relitigation of culpability for a murder of which Bolden has been acquitted.

The exception for the discovery of new and additional evidence has disturbing implications. It would allow a prosecutor, disgruntled over an acquittal of the substantive charge where the citizen has denied involvement, the ability to retry the case under the guise of a perjury charge. Additionally, the exception is at odds with the express teachings of *Ashe*.

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do – he refined his presentation in light of the turn of events at the first trial." But this is precisely what the constitutional guarantee forbids.

Id., 397 U.S. at 447.

The use of new and additional evidence would allow the prosecutor to refine his presentation of evidence in contravention of the prohibition of *Ashe*.

The Supreme Court of Pennsylvania has previously rejected the rationale that the discovery of additional evidence would allow the state to relitigate free of the impediment otherwise imposed upon it by this constitutional protection.

> *If collateral estoppel is applicable and the issue has been deemed to be foreclosed, the fact that additional corroboration may be available is of no consequence. Commonwealth v. Peluso, supra; Wingate v. Wainwright,* 464 F.2d 209 (5th Cir. 1972). Thus

> the additional fact of corroboration in the perjury action is not determinative; what is controlling is that the direct evidence of the falsity produced in the perjury trial was the same evidence that was rejected in the original trial.

Commonwealth v. Hude, 492 Pa. 600, 425 A.2d 313, 322 (1980). (Emphasis added) (Footnote omitted). Moreover, this Court in *Harris v. Washington*, 404 U.S. 55, 56, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971), found that collateral estoppel, an integral part of the constitutional guarantee against double jeopardy, would apply to prohibit a second trial, when the ultimate issue of identity had been decided by the first jury, irrespective of whether the jury considered all relevant evidence.

Thus, in a trial under the rationale of the majority opinion, a defendant would have to run the gauntlet a second time whenever the state came forward with additional evidence that it "discovered" after the first trial. What a dangerous tool, indeed, to give a prosecutor. For example, if two eyewitnesses were not enough to convict on the substantive offense, then three could be produced at a new trial in which the nominal charge was perjury. This exception to the principle of collateral estoppel would effectively allow the state to circumvent the rule whenever its prosecutor "produced" evidence not available at the initial trial, in contravention of *Harris*.

B. A Perjury Prosecution Simply May Not Be Used To Avoid The Express Command Of *Ashe* That Bars Litigation Between The Parties Of Ultimate Facts Previously Decided At The Former Trial.

Apparently concerned that if a prosecution for perjury is barred, the petitioner would not be subject to any sanction for his alleged false testimony at the murder trial, the majority opines that there is much logic in the proposition that *Ashe* does not apply when the offenses involved are as different as a substantive crime and perjury committed at the trial of the substantive offense. (App., *infra*, A6, n.4). Though not specifically adopting this rationale, the inclination to accept such a limitation on the doctrine of collateral estoppel is disturbing. Even though petitioner is not subject to a new prosecution arising out of a single criminal transaction, the rationale of *Ashe* still applies, to-wit:

> For the record is utterly devoid of any indication that the first jury could rationally have found that [a murder] had not occurred, or that [Spicer] had not been a victim of that [murder]. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been [the murderer]. And the jury by its verdict found that he had not. The federal rule of law, therefore, would make a second prosecution for the [murder] of [Spicer] wholly impermissible.

Id., 397 U.S. at 445.

If the state is allowed to proceed, petitioner will again be required to relitigate the Spicer homicide. For

without this evidence, there simply can be no viable perjury prosecution.

Thus, to suggest that the doctrine has no place in a perjury prosecution would, in effect, afford the state with a new opportunity to attempt to establish the underlying charge "of which [petitioner] has been acquitted." (App., *infra*, A15).

CONCLUSION

For the foregoing reasons, it is submitted that a dangerous precedent has been set by the Louisiana Supreme Court that impermissibly curtails application of the collateral estoppel doctrine. Accordingly, citizens of the State of Louisiana, who, under oath, deny guilt at the trial on the substantive charge, will be subject to stand twice in jeopardy under the guise of a perjury charge whenever a disgruntled prosecutor produces new evidence which was not available at the initial proceeding. Mr. Bolden respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

BLANCHARD, WALKER, O'QUIN & ROBERTS
(A Professional Law Corporation)
ANSEL MARTIN STROUD, III
La. Bar Roll No. 12548

1400 Premier Bank Tower
Post Office Drawer 1126
Shreveport, Louisiana 71163-1126
(318) 221-6858

Attorneys for Petitioner

APPENDIX A

STATE of Louisiana

v.

Ivrin BOLDEN, Jr.

No. 93-KK-1933.

Supreme Court of Louisiana.

July 5, 1994.

Defendant was charged with perjury. After his motion to quash bill of information was denied and his application to Court of Appeal for supervisory review was denied, defendant applied for certiorari. The Supreme Court, Marcus, J., granted certiorari, and held that defendant could be tried for perjury based on later statement he made in contradiction of his sworn testimony at murder trial.

Affirmed.

Ortique, J., dissented and assigned reasons.

Lemmon, J., concurred and assigned reasons.

Watson, J., dissented.

A.M. Stroud, III, Blanchard, Walker, O'Quin & Roberts, Shreveport, M. Allyn Stroud, Brook, Morial, Cassibry, Pizza & Adcock, New Orleans, for applicant.

Richard Ieyoub, Atty. Gen., Jerry J. Jones, Dist. Atty., Charles Leslie Cook, Asst. Dist. Atty., for respondent.

MARCUS, Justice*

At issue is whether a defendant acquitted of a crime may be subsequently tried for perjury based on a later statement made by him contradicting his testimony at the former trial.

On March 20, 1987, defendant was indicted for the second degree murder of Brenda Lee Spicer. At trial, the state sought to show that defendant murdered her because he was jealous of the close relationship between Spicer and defendant's girlfriend, Joel Tillis. Defendant testified on his own behalf and specifically denied killing Spicer:

> Q. Did you meet Brenda Spicer at that storage locker on March 5th?
>
> A. No, I did not at any time that day.
>
> Q. The only time you saw Brenda Spicer is when she gave you that camera and the $5.00.
>
> A. I saw her earlier in the dorm and the last time I saw her was at the intersection when she had given me the camera.
>
> Q. Did you have any kind of physical struggle or contact with Brenda Spicer that day?
>
> A. No, I didn't, didn't have any contact with her at all physically.

---

* Charles A. Marvin, Chief Judge, Court of Appeal, Second Circuit, sitting in place of Justice James L. Dennis. Judge Marvin participated in the court of appeal proceedings in this case; therefore, he was recused and Justice Watson became a member of the panel. See Rule IV, Part 2.

Q. Did you have any kind of sexual intercourse with Brenda Spicer?

A. Never did.

Q. You never have?

A. No, I haven't.

Q. Did you kill Brenda Spicer on March 5th?

A. No, I did not.

At the conclusion of trial, the jury returned a verdict of "not guilty."

Subsequently, defendant and Tillis moved to Memphis, Tennessee. In 1990, Tillis disappeared, and her body was later found in Arkansas. Defendant was a suspect in her disappearance, but was never arrested and later moved to New Jersey. Approximately two years later, defendant filed a complaint against a woman named Jennifer Spurlock and was summoned to the Burlington County Prosecutor's Office in New Jersey in connection with the complaint. In the course of questioning, defendant confessed to the killing of Joel Tillis,[1] and made the following statement concerning Brenda Spicer:

Q. Other than Joel Tillis, who is the other girl that you killed?

A. Brenda Spicer.

Q. And what were the circumstances surrounding the death of Brenda Spicer?

---

[1] Defendant was subsequently indicted in Tennessee for the first degree murder of Joel Tillis. He entered a plea to a reduced charge of involuntary manslaughter and received a sentence of ten years.

A. I don't know, she, she made me mad too, I guess. I was, I always wanted to be, with whatever girl I am, I always wanted to be, have some attention with them and just be with them without somebody else, I guess getting her attention. Joel seemed to always give her a lot of attention and, with, you know, with me around, and I didn't like that. I tried to, you know, talk to her, talk to Joel about it, and you know, ask her about it, but she kept on.

Q. What were the circumstances surrounding the death of Ms. Spicer?

A. I went, um, I asked her come to like, we had a storage unit, and I asked her to come with me and then I was trying to talk to her, you know, I had been asking her and asking her to, you know, try to give me some time with Joel and she just, you know, she just kept saying that she was going to be with Joel no matter what, and so I just, I got mad with her and I strangled her.

Q. And where did this take place at, the storage area?

A. Yeah.

Q. And where was the storage area located?

A. Not far from the college campus in Monroe, Louisiana.

Q. And after you strangled her, what did you do?

A. Took her body back to the campus and put it in the dumpster and went back to the game or I went back to the dorm or something.

As a result of the New Jersey statement, defendant was charged in Louisiana with perjury.[2] The bill of information provided that defendant intentionally and knowlingly committed perjury when he was being tried for the murder of Brenda Spicer "by testifying in response to questions concerning whether he had physical contact with and/or killed Brenda Spicer, a matter material to the issue or controversy in question." Defendant filed a motion to quash the bill of information. After a hearing, the trial judge denied the motion. Defendant applied to the court of appeal for supervisory review. The court denied the application:

> *WRIT DENIED.*
>
> None of the controlling cases cited by applicant concern a perjury defendant who, after testifying that he did not commit a previous offense and being acquitted, subsequently admitted that indeed he committed the acquitted for crime. Even a previous determination of credibility should not foreclose (under the double jeopardy clause and included collateral estoppel doctrine) a perjury prosecution if, at

---

[2] La.R.S. 14:123 provides in pertinent part:

> Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding . . . . In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to matter material to the issue or question in controversy.
>
> It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

> the latter trial, the state produces new and direct evidence that defendant lied under oath at his first trial, thus permitting the trier of fact to conclude beyond a reasonable doubt that perjury transpired.
>
> Moreover, applicant will have an adequate remedy on appeal in the event of a conviction.

Upon defendant's application, we granted certiorari to consider the correctness of the ruling denying the motion to quash. 629 So.2d 1155.[3]

The sole issue before us is whether defendant, having been found not guilty of Spicer's murder, may be subsequently tried for perjury based on a later statement made by him contradicting his sworn testimony at the murder trial.

Defendant argues, and we agree, that the controlling case in this area is *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), in which the Supreme Court held that the doctrine of collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy.[4] The Court defined collateral estoppel as meaning when an "issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot

---

[3] 629 So.2d 1155 (La. 1993).

[4] Some courts have suggested in dicta that *Ashe* was only intended to protect defendants from multiple prosecutions for crimes arising out of a single criminal transaction, and was not meant to apply to situations such as perjury committed at the trial of the substantive offense. *State v. DeSchepper*, 304 Minn. 399, 231 N.W.2d 294 (1975); *State v. Redinger*, 64 N.J. 41, 312 A.2d 129 (1973). There is some support for this position in *Ashe* itself. 397 U.S. at 446, n. 10, 90 S.Ct. at 1195, n. 10. We agree there is much logic to this position; however, in the absence of more

again be litigated between the same parties in any future lawsuit." *Id.* at 443, 90 S.Ct. at 1194. In order to apply this doctrine, the Court posited the following test:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding." *Id.* at 444, 90 S.Ct. at 1194 (footnotes and citations omitted).

In the context of a perjury indictment relating to testimony given at a former trial on a substantive charge, courts have held that the doctrine of collateral estoppel does not bar the perjury prosecution unless the issues of fact central to that prosecution were *necessarily* determined in the former trial. *United States v. Williams,* 341 U.S. 58, 71 S.Ct. 595, 95 L.Ed. 747 (1951); *United States v. Haines,* 485 F.2d 564 (7th Cir.1973), *cert. denied,* 417 U.S. 977, 94 S.Ct. 3184, 41 L.Ed.2d 1147 (1974); *State v. Conway,* 661 P.2d 1355 (Okla.Crim.App.1983). With these precepts in mind, we now turn to an examination of the record in defendant's former trial.

On the morning of March 6, 1987, the partially nude body of Brenda Spicer was found in a trash dumpster at the Northeast Louisiana University (NLU) campus in

---

explicit guidance from the Supreme Court, we decline to adopt it here.

Monroe, Louisiana. The coroner determined the time of death as being approximately 7:00 p.m. on the previous day. An autopsy revealed that the cause of death was heart failure due to strangulation. There was sperm in the victim's vagina and rectum, but no evidence of trauma in either area. Tests performed on the seminal fluid and saliva taken from the victim's breasts indicated they came from a type A secretor. Defendant was a type A secretor, although the testimony indicated that approximately 80% of the population secretes ABO blood group substance in their bodily fluids. Hand prints were also found on the body, but the fingerprints could not be determined.

Agnella Katrice Lee testified that she had shared a dorm suite with fellow ladies' basketball players Derunzia Johnson, Joel Tillis and Lavette Lloyd. She testified that Spicer, a former basketball player, had also lived in the suite. Although Spicer had resigned from school by March, 1987, Lee testified that Spicer stayed in the room when she visited the campus and was there on March 5, 1987. At approximately 4:30, Spicer told Lee she had to meet defendant to get something from him for Joel. Spicer said she was "having a little fling" with defendant, but Lee took this to be a joke. At approximately 6:00, Lee received a phone call from defendant, asking for batteries for a camera. She went down to bring him the batteries, then got dressed to go to the game, which started at 7:00. She saw defendant at the game, but did not see Spicer.

Linda Harper, NLU's ladies' basketball coach, testified that she received a call from defendant asking her to help him get his girlfriend back. Defendant complained to her that whenever he came to visit Tillis, Spicer wanted

to "hang around" and wanted to go everywhere they went.

Joel Tillis testified that she had known Spicer since 1986, when Spicer was a freshman and she was a senior. Tillis described her friendship with Spicer "as being a big sister." She testified that on March 5, 1987, she went to the coliseum at 2:00 for shooting practice accompanied by Spicer. Defendant was also there. Tillis left the coliseum at approximately 2:45 with defendant and went with him to clean out his mini-warehouse, staying there for about twenty minutes. Tillis stated both she and defendant had keys to the warehouse, and testified that Spicer had been to the warehouse several times during the semester to get her fan, using Tillis' key. When Tillis returned to her room, she had a message that a local TV station wanted to interview her. She and defendant went to the interview, then went to get ice cream. Tillis returned to her room at 4:30 to meet her mother. Defendant did not go up to her room, but stayed downstairs with two friends who had come in with her mother. Tillis went to eat with her mother. She returned to her room at approximately 5:00 and saw Spicer there. Tillis had instructed her mother to give defendant her camera and $5.00 for film. Spicer got the camera and money from Tillis' mother and told Tillis she was supposed to meet defendant in front of the Student Union Building. Spicer drove Tillis to the coliseum, dropping her off at approximately 5:45. This was the last time Tillis saw Spicer alive. She saw defendant at the game, taking pictures on the floor.

Vincent Lee, a student at NLU, testified that he went to the basketball game on March 5, 1987. He arrived at

the game when it was almost half time. He observed defendant running away from the coliseum.

Defendant testified that he had met Tillis while attending NLU and started dating her exclusively. After graduating from NLU, he began attending medical school in New Orleans in the fall of 1986. He first met Spicer when she had come to visit Tillis. He stated that he got along well with Spicer, although they had some "differences" concerning Spicer's friendship with Tillis. On March 5, 1987, defendant had planned to come to the basketball game, since it would be Tillis' last home game. Defendant arrived at the NLU campus at about 2:15 and went to the coliseum to watch Tillis at shooting practice. After practice, he and Tillis went to clean out his storage locker. They then went to the interview at the TV station, went to get ice cream, then returned to Tillis' dorm. He testified that the first time he saw Spicer that day was when he was down in the lobby of the dorm. At around 5:25, defendant decided to go look for his former roommate, Calvin Robinson, at the gym where they normally played basketball. Unable to find Robinson, defendant drove back toward Tillis' dorm. On the way, he saw Spicer in her car, and she waved him over. Defendant walked over to her car, and she handed him the camera and $5.00 and told him that Tillis wanted him to get some film for the camera. Defendant took the camera and went to K-Mart to get some film. He returned to campus at approximately 6:00. He learned that the batteries were dead in the camera and telephoned Tillis' room. Lee answered the phone and brought the batteries to him. After installing the batteries, defendant took a picture of Joel's friends, Matt and Eddie, in the lobby. At about 6:15,

defendant, along with Joel's mother and sister walked to the coliseum. After they found seats, defendant went down to the floor to take close up pictures of the girls running out. After taking pictures of the pre-game ceremony, defendant returned to his seat. At some point near the end of the first half, defendant left his seat to go to the restroom. He came back toward the end of half time and stopped to talk with a friend for a few minutes. By the time he had taken his seat, the second half buzzer had gone off. About five or ten minutes later, defendant took Tillis' sister to get a drink at the concession stand. After the game ended, defendant went down on the floor to get some autographs. Tillis asked defendant to get some tennis shoes out of his car that they had retrieved earlier from the storage locker. On the way back to the coliseum, defendant saw Tillis' car parked on the street. Defendant decided to drive Tillis' car back to the coliseum, since Tillis' mother had complained that her feet were hurting. Defendant drove Tillis, her mother and friends back to the dorm. Defendant then drove back to his apartment in New Orleans. He received a call from Tillis at approximately 2:15 in the morning, telling him that Spicer was missing. The next morning, Tillis' mother called him and told him Spicer was found dead.

Having reviewed the record, we find that the jury decided that the state failed to prove beyond a reasonable doubt that defendant murdered Brenda Spicer. Clearly, the doctrine of collateral estoppel bars the state from relitigating the issue of whether defendant murdered Spicer. However, it is arguable whether the jury *necessarily* decided the issue of whether defendant was telling the truth when he testified under oath that he did not kill

Brenda Spicer or have physical contact with her. This was not a situation where the jury was presented with two conflicting versions of the facts and forced to determine the veracity of one over the other. *Cf. United States v. Sarno,* 596 F.2d 404 (9th Cir.1979); *Commonwealth v. Hude,* 492 Pa. 600, 425 A.2d 313, 321 (1980). The state presented no eyewitness testimony contradicting defendant's assertions that he did not kill Spicer or have physical contact with her. Rather, the state's case was based on circumstantial evidence showing that defendant had the motive and opportunity to kill Spicer.

Of course, in any case where the defendant has testified and been acquitted, it could be said that the jury has passed on his credibility and found him truthful, and a subsequent prosecution for perjury should be barred. However, even assuming that defendant's credibility was necessarily decided by the jury, we find that under the unique circumstances of this case, the doctrine of collateral estoppel does not bar defendant's prosecution for perjury.

The major factor that distinguishes this case from all other reported cases we have examined is that in this case, the state has obtained new evidence not available to it during the original trial that defendant testified falsely under oath. Several cases have suggested in dicta that when the state produces new and additional evidence that defendant lied under oath at his first trial sufficient to permit the trier of fact to conclude beyond a reasonable doubt that perjury has been committed, the doctrine of collateral estoppel does not bar a prosecution for perjury. *United States v. Nash,* 447 F.2d 1382 (4th Cir.1971) (Winter, J. concurring); *Kuskulis v. United States,* 37 F.2d 241 (10th

Cir.1929); *Allen v. United States,* 194 F. 664 (4th Cir.1912); *see also,* Note, Perjury by Defendants: The Uses of Double Jeopardy and Collateral Estoppel, 74 Harv.L.Rev. 752, 763 (1961).

We believe that such a rule comports with the fundamental policy considerations behind the doctrine of collateral estoppel when applied in the context of perjury. On the one hand, there is a concern that allowing an acquittal to insulate the defendant from perjury will give a defendant "an uncontrollable license to testify falsely," with a resulting detriment to the reliability of evidence. On the other hand, there is an apprehension that allowing a prosecution for perjury will give the state a "second shot" at defendant for the same wrong, or allow an overzealous prosecutor to use the perjury trial to retry issues already determined in defendant's favor. *Adams v. United States,* 287 F.2d 701, 703 (5th Cir.1961); *Commonwealth v. Hude,* 425 A.2d 313, 318 (Pa.1980). The concern that the state should not be given a second chance based on the same evidence was central to the Court's holding in *Ashe*:

> In this case the State in its brief has frankly conceded that following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution: "No doubt the prosecutor felt the state had a provable case on the first charge and when he lost, he did what every good attorney would do – he refined his presentation in light of the turn of events at the first trial." *But this is precisely what the constitutional guarantee forbids.*
>
> 397 U.S. at 447, 90 S.Ct. at 1196 (emphasis added).

In the present case, it is clear the state is not attempting to rehash or refine the evidence used in the first trial in order to take a "second shot" at defendant. Rather, the state in good faith has obtained new and additional evidence that was not previously available to it indicating that defendant testified falsely under oath during the former trial. Under these circumstances, applying the doctrine of collateral estoppel with "realism and rationality" as required by *Ashe*, we believe that the state should not be barred from prosecuting defendant for perjury.[5]

In sum, assuming that defendant's credibility was necessarily at issue in the former trial, we find that the present prosecution for perjury is not barred, since the state is able to produce new and additional evidence that defendant testified falsely under oath during the former trial.[6] Hence, we

---

[5] We recognize that under our decision in *State v. Elsby*, 416 So.2d 60 (La.1982), the new evidence (the unsworn statement to police) may be insufficient by itself to convict defendant of perjury. It will be up to the state at trial to produce corróborating evidence to show that defendant's statements to the New Jersey authorities were in fact truthful. Since we do not know what evidence the state plans to rely on in this regard, it would be inappropriate to speculate on its admissibility at this time.

[6] Of course, this new evidence requirement applies only to issues necessarily decided by the jury. When issues have not been necessarily decided by the jury, the courts have allowed perjury prosecutions without a threshold requirement of new evidence. See *United States v. Richard*, 892 F.2d 761 (9th Cir.1989) (authenticity of trip log not necessarily decided by jury that acquitted defendant of alien smuggling charges); *United States v. Baugus*, 761 F.2d 506 (8th Cir.1985) (alibi testimony was not necessarily decided by jury that acquitted defendant of mail fraud); *United States v. Giarratano*, 622 F.2d 153 (5th Cir.1980)

find the trial court correctly denied defendant's motion to quash.

DECREE

For the reasons assigned, the judgment of the district court denying the motion to quash is affirmed. The case is remanded to the district court for further proceedings.

WATSON, J., dissents, believing that conviction of perjury would necessitate a finding of guilt on a charge of which he has been acquitted.

ORTIQUE, J., dissents and assigns reasons.

LEMMON, J., concurs and assigns reasons.

ORTIQUE, Judge, dissenting.

The United States Supreme Court held in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), "that the Double Jeopardy Clause bars subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 510, 110 S.Ct. at 2087, Clearly, under *Grady*, Irvin Bolden's prosecution for perjury would be barred.

In 1993, the U.S. Supreme Court revisited the issue of what test is appropriate in determining whether the Double Jeopardy Clause bars a subsequent prosecution. In

---

(issue of unauthorized payments to defraud was not necessarily decided at trial for mail fraud, since trial court found proof of mailing was insufficient.)

revisiting the issue, the Court overruled *Grady*, finding it to have established a test that is unstable in its application. Additionally, the Court found that *Grady* "[contradicted] an unbroken line of decisions, contained less than accurate historical analysis and produced confusion." *U.S. v. Dixon*, ___ U.S. ___, ___, 113 S.Ct. 2849, 2864, 125 L.Ed.2d 556 (1993).

However, the Court in overruling *Grady* did not address the effect of the collateral estoppel aspect of the Double Jeopardy Clause nor the "issues necessarily decided" rule emanating therefrom. The Court recognized that under *Ashe v. Swenson*, relied upon by the majority in the case *sub judice*, an acquittal in the first prosecution may well bar subsequent prosecution for a separate offense where the government has *lost* an earlier prosecution involving the same facts (emphasis in original) ___ U.S. ___, ___, 113 S.Ct. 2849, 2860.

But this truth has been self-evident to legal scholars since Blackstone's Commentaries were reviewed by Hamilton, Madison, Jefferson and Jay – stalwart framers of our Constitution:

> "[T]he plea of autrefoits acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence."[1]

---

[1] 4 Blackstone Commentaries 335, quoted in *Benton v. Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707 (1969).

And to Thurgood Marshall, whose brilliant discourse on this hallowed principle, steeped in Greek and Roman precepts of justice, has been referenced *juris et de jure!*[2]

In the case at bar, Bolden has argued that he confessed to New Jersey officials solely for the purpose of frightening a woman who was unwilling to end her relationship with him. By making this argument, Bolden puts the prosecution in a position of having to prove defendant lied in the previous trial only by proving that he in fact killed Joel Tillis and therefore his testimony denying same was false.

The majority concludes, based upon *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), its progeny and cases decided prior to *Ashe*, that defendant's assertion that his prosecution on a charge of perjury subsequent to an acquittal on a charge of second degree murder is barred by the doctrine of collateral estoppel and double jeopardy lacks merit. I respectfully dissent.

The majority adopts the "issues necessarily adjudicated" rule annunciated in *United States v. Williams*, 341 U.S. 58, 71 S.Ct. 595, 95 L.Ed. 747 (1951) and followed in *United States v. Haines*, 485 F.2d 564 (7th Cir.1973), *cert. denied*, 417 U.S. 977, 94 S.Ct. 3184, 41 L.Ed.2d 1147 (1974) and *State v. Conway*, 661 P.2d 1355 (Okla.Crim.App.1983). In the seminal case relied upon by the majority, the Court found that a subsequent prosecution for perjury was not barred where acquittal on a charge of aiding and abetting abuse of a prisoner under color of state law did not constitute a determination that three other officers did

---

[2] *Id.*

not see a fellow officer abuse a prisoner. The Court determined, there was no double jeopardy where the jury reached no verdict on the charge of conspiracy; thus the issue was not necessarily adjudicated in the previous trial. Any careful analysis demonstrates that *Williams, supra,* is distinguishable from the case at bar. The jury, in the case before us, rendered a verdict of acquittal in Bolden's trial for murder. At that trial, defendant Bolden testified and denied that he had killed and/or raped Brenda Spicer. The jury in fact specifically accepted as true that denial or else, he would not have been acquitted.

I conclude that a subsequent prosecution for perjury is, in this case, barred if not by the Double Jeopardy Clause *per se,* by the collateral estoppel aspect of the Fifth Amendment. This inescapable conclusion reached hereinabove has been consistently validated for almost a half century. Where the fact to which a defendant testifies in a previous trial forms the basis of a perjury charge, as in the case at bar, and that fact constituted the act which formed the basis of the crime with which the defendant was initially charged, and that fact is necessarily determinative of the issue, acquittal on the first offense bars a subsequent perjury prosecution. *Ehrlich v. United States,* 145 F.2d 693 (5th Cir.1944). In *United States v. Richard,* 892 F.2d 761 (9th Cir.1989), defendant was initially charged with transporting illegal aliens. During trial, defendant submitted a taxi trip log allegedly written on the day he was arrested. Defendant was acquitted on the alien smuggling charge. Nearly one year later, defendant was tried for giving false testimony, obstructing justice and using a false document; defendant challenged his conviction on

these charges on the ground of double jeopardy. The court of appeals' analysis involved three steps. First, the issues in the two actions must be identified for purposes of determining the similarity of issues. Secondly, the record in the prior case must be examined to decide whether the issue was litigated in the first case. Thirdly, the record in the prior proceeding must be examined to ascertain whether the issue was necessarily decided in the first case. Finding that the jury may have acquitted defendant without determining whether the trip log was authentic, the authenticity of the log was not necessarily determined by his acquittal; thus defendant could be tried based upon fabrication of the log without exposing defendant to double jeopardy. Could the jury in the case at bar have acquitted Bolden without believing he was truthful when he denied killing Spicer?

The majority overlooks an important aspect of the "issues necessarily adjudicated" rule, which requires a distinction between ultimate facts and evidentiary facts. Ultimate facts are those upon which a defendant's liability or exoneration depend, while evidentiary facts are those facts established by the evidence. This distinction is significant since the doctrine of collateral estoppel applies only to issues that were ultimate in a first proceeding. Note, Collateral Estoppel in Criminal Cases – A supplement to the Double Jeopardy Protection, 21 RUTGERS L. REV. 274 (1967). Where the fact to which a defendant testifies and upon which the perjury charge is based was the act which constituted the crime of which a defendant is accused and the fact is necessarily determinative of the issue, acquittal of the first offense bars subsequent prosecution for perjury. *Ehrlich v. United*

States, 145 F.2d 693 (5th Cir.1944). Based upon *Ashe* as well as *Ehrlich,* applying the "issues necessarily adjudicated" rule in the case at bar, Bolden's prosecution for perjury is barred. The perjury charge in this case is based upon the act which constituted the crime of which defendant was accused. Defendant's testimony that he did not kill or rape Spicer, regards an ultimate fact that is necessarily determinative of the issue of Bolden's guilt or innocence on the charge of second degree murder.

Numerous courts have held, applying the "issues necessarily adjudicated" test that in previous trials on other charges, juries necessarily pass upon the veracity of a defendant in reaching a verdict of acquittal. *United States v. Hernandez,* 572 F.2d 218 (9th Cir.1978) (acquittal in first trial on charge of billing the government for more hours spent providing legal services than were actually spent; second trial for perjury); *United States v. Nash,* 447 F.2d 1382 (4th Cir.1971) (acquitted in first trial on mail theft charge, subsequently charged with perjury on basis of the impossibility of defendant's having obtained money as she testified in first trial); *Jay v. State,* 15 Ala.App. 255, 73 So. 137 (1916) (holding that further inquiry into falsity of defendant's prior testimony in a rape case is barred); *Youngblood v. United States,* 266 F. 795 (8th Cir. 1920) (where a defendant denies guilt in a previous trial, a subsequent prosecution on a perjury charge is barred); *Myers v. State,* 57 Md.App. 325, 470 A.2d 355 (Ct.Spec.1984) (acquittal in previous trial on theft charges barred subsequent perjury prosecution where court determined defendant's veracity was necessarily decided by fact-finder). Again, could the jury have acquitted Bolden had they found his testimony regarding whether he had contact

with Spicer or whether he raped or killed Spicer to be untrue?

This court has previously applied the "same evidence" test when it has been necessary to determine whether double jeopardy has or will attach. *State v. Miller,* 571 So.2d 603 (La. 1990); *State v. Knowles,* 392 So.2d 651 (La. 1980); *State v. Solomon,* 379 So.2d 1078 (La. 1980). Where the same evidence or substantially the same evidence will be used in the second trial, the second prosecution is barred. The majority has accepted the state's contention that it does not intend to base its perjury case solely on the evidence adduced at defendant's trial on the second degree murder charge. However, in argument to this court, the state was unable to set forth the evidence it intends to offer to prove that defendant lied when he testified that he did not kill or rape Brenda Spicer. The only additional evidence the state has indicated it will use is the New Jersey confession. Consequently, any perjury prosecution will be based upon substantially the same evidence and thus it is barred. This is particularly true in view of the evidentiary problems associated with admission of an unsworn statement. *See* majority opinion note 5.

It cannot be denied that defendant in his New Jersey confession admitted commission of a heinous crime. However, he had been previously acquitted, in Louisiana, by a jury verdict . . . guilt or innocence to the contrary notwithstanding!

In my view, the jurisprudence is clearly supportive of a finding favorable to the defendant. The notion of preventing double jeopardy "[l]ike the right to trial by jury,

[it] is clearly fundamental to the American scheme of justice." *Benton v. Maryland, supra,* 395 U.S. at 796, 89 S.Ct. at 2063. We cannot allow society's zeal for punishment to supersede the guarantees contained in our Bill of Rights. One day, the accused may truly be innocent, and bad precedents may sanction the violation of that person's constitutional rights. To allow ourselves to be swayed by the speculation that defendant should at least be put to the inconvenience of a second trial on the same issues decided in the previous trial, does violence to both our state and federal Constitutions.

For these reasons, I respectfully dissent.

LEMMON, Judge, concurring.

The collateral estoppel doctrine, determined in *Ashe v. Swenson,* 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) to be a component of the Fifth Amendment guarantee against double jeopardy, is primarily designed to prevent the state from conducting successive prosecutions against the same defendant for crimes arising out of the same course of conduct. The prosecution of a person for perjury committed in an earlier trial of the same person involves an offense which arises out of a completely separate course of conduct than the underlying offense of which the person was acquitted.

The common law doctrine of collateral estoppel may also rise to constitutional dimensions if the state pursues a perjury prosecution based on testimony by the defendant in a previous criminal proceeding which resulted in an acquittal, when the perjury prosecution is based on the same evidence available at the first trial and represents a mere relitigation of the underlying charge rejected by the

first jury on that evidence. The collateral estoppel aspect of double jeopardy may be applied to bar using the same evidence to relitigate an issue decided in an earlier proceeding in which the evidence was material and was necessarily decided by the jury.

There is no constitutional violation, however, when a perjury prosecution is based on evidence that was not available in the first trial. Application of common law collateral estoppel to preclude the subsequent prosecution for perjury is not constitutionally required, and would permit a criminal defendant to secure an acquittal through perjured testimony and then use the unconscionably obtained acquittal as a shield against prosecution for the very perjury that led to the acquittal. No such protection is allowed to any other witness who gives perjured testimony during a trial, and the constitutional guarantee against double jeopardy does not require that protection for a criminal acquittee.

The state in the present case, by showing evidence of defendant's New Jersey confession to the Spicer murder, has presented prima facie proof that defendant committed perjury in the Spicer murder trial. This evidence, which obviously did not exist at the time of the murder trial, establishes that the state is not relitigating the determinative issue in the murder trial *merely* in hope of a more favorable decision. This evidence further establishes that defendant may well be using an acquittal obtained by perjury to shield himself from prosecution for that perjury. These circumstances, where the state has newly discovered evidence that did not exist at the time of the trial of the underlying offense and that indicates defendant secured his acquittal of the offense through

perjury, do not present the evil that constitutional application of collateral estoppel was designed to prevent, and there is no constitutional bar to the perjury prosecution.[1]

---

[1] Of course, the state at the perjury trial must prove every element of the offense, and the unsworn New Jersey confession may fall short of meeting that burden. Nevertheless, the issue presently before the court is whether the state can even proceed with the perjury prosecution.

SUPREME COURT OF LOUISIANA
OFFICE OF THE CLERK
301 Loyola Ave.
New Orleans, Louisiana 70112

Dear Counsel:

Attached you will find a copy of the opinion in a case in which you are counsel.

The judgment in this case will become final at the expiration of fourteen (14) days unless an application for rehearing is filed within the delay provided and in conformity with the provisions of Rule IX of the Supreme Court, as revised and amended.

Sincerely yours,

Frans J. Labranche, Jr.
Clerk of Court

APPENDIX B

COURT OF APPEAL, SECOND CIRCUIT
STATE OF LOUISIANA
430 Fannin Street
Shreveport, La. 71101
(318) 227-3700

STATE OF LOUISIANA	NO: 25495-KW
VS	FILED: 5/27/93
IVRIN BOLDEN, JR.	RECEIVED: 5/27/93

On application of Ivrin Bolden, Jr. for supervisory writs in No. 92- F0387 on the docket of the 4th Judicial District Court, Parish of Ouachita, Hon. Michael S. Ingram, Judge.

Ansel Martin Stroud III Esq.	Counsel for Bolden, Ivrin Jr.
Hon. Jerry L. Jones & Charles Leslie Cook Esq.	Counsel for State of Louisiana

BEFORE JUDGES MARVIN, HIGHTOWER, AND BROWN

WRIT DENIED.

None of the controlling cases cited by applicant concern a perjury defendant who, after testifing [sic] that he did not commit a previous offense and being acquitted, subsequently admitted that indeed he committed the acquitted-for crime. Even a previous determination of credibility should not foreclose (under the double jeopardy clause and included collateral estoppel doctrine) a

perjury prosecution if, at the latter trial, the state produces new and direct evidence that defendant lied under oath at his first trial, thus permitting the trier of fact to conclude beyond a reasonable doubt that perjury transpired.

Moreover, applicant will have an adequate remedy on appeal in the event of conviction.

Shreveport, Louisiana this 17 day of June, 1993.

/s/ Hightower /s/ Marvin /s/ Brown

FILED: June 17, 1993

/s/ Diane Pratt Heisler
CLERK

APPENDIX C

STATE OF LOUISIANA * PARISH OF OUACHITA *
FOURTH DISTRICT COURT

STATE OF LOUISIANA	*	FILED: April 26, 1993
	*	
VS. NO. 92-F0387	*	/s/ Donald L. Sims
IVRIN BOLDEN, JR.	*	DEPUTY CLERK OF
	*	COURT

RULING ON MOTIONS

Defendant's Motion for Change of Venue is granted. All other pending motions are denied.

Monroe, Louisiana, this 26th day of April, 1993.

/s/ Michael S. Ingram
MICHAEL S. INGRAM,
JUDGE
DIVISION F

APPENDIX D

STATE OF LOUISIANA PARISH OF OUACHITA
FOURTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

VS. 92-F0387

BOLDEN, IVRIN, JR.
(9200677F)
B/M DOB:10-01-64
SS# 434-39-8691
PERJURY

FILED: Sept. 3, 1992

BY: /s/ Jeroline Fuller
DEPUTY CLERK
OF COURT

BILL OF INFORMATION

THE DISTRICT ATTORNEY FOR THE PARISH OF OUACHITA, STATE OF LOUISIANA, CHARGES THAT BOLDEN, IVRIN, JR., IN THE PARISH AND STATE AFORESAID, DID:

ON OR ABOUT MARCH 11, 1988

CT. 1 – INTENTIONALLY AND KNOWINGLY COMMIT PERJURY AFTER BEING SWORN AS A WITNESS AT TRIAL OF THE MATTER STYLED STATE OF LOUISIANA V. IVRIN BOLDEN, JR., NO.45434, FOURTH JUDICIAL DISTRICT COURT, OUACHITA PARISH, LOUISIANA, A PROSECUTION FOR WHICH HE WAS BEING TRIED FOR THE MURDER OF ONE BRENDA SPICER, BY TESTIFYING IN RESPONSE TO QUESTIONS CONCERNING WHETHER HE HAD PHYSICAL CONTACT WITH AND/OR KILLED BRENDA SPICER, A

MATTER MATERIAL TO THE ISSUE OR CONTROVERSY IN QUESTION.

/s/ Charles Cook
ASSISTANT DISTRICT
ATTORNEY

APPENDIX E

By the Court: All right. The State will now make it's opening statement.

By Ms. McCoy:

On March 5th, 1987, a body of a young woman was found in a trash dumpster in front of Strauss Hall at Northeast Louisiana University Campus. On March 5th, 1987, the body of Brenda Lee Spicer, a former Northeast Louisiana University student and ex-ladies basketball player, was found in a dumpster at Strauss Hall in Monroe Louisiana. The body of Brenda Lee Spicer was found in a dumpster where she had been left for dead. The evidence will show on the day before Brenda Lee Spicer died she came to Monroe, just like any other day, to see the Northeast Lady Indians play their last home game of the season. She was going to see her very best friend in the world, Joel Tillis, play her last home ladies basketball game and also be honored as a graduating senior that night. So, Brenda Spicer came to Monroe and went to Joel Tillis' room. Because Joel was a student at Northeast, she lived in Monroe Hall. Joel spent the night in Joel's . . . Brenda spent the night in Joel's room and that morning, March 5th, she got up and went to Joel's room and visited her just like any other morning, just like any other day. She had lunch with Joel and she went to her room and visited with her roommates, Lavette Lloyd, Katrice Lee, Derunzia Johnson. And at approximately 4:00 o'clock the day before her body was found . . . about 4:00 o'clock on that day, she got up, looked at her watch and decided to get dressed because she was going to go to the Lady

Indian ball game that night. She got dressed, put her clothes on and told her friends that she was leaving, and she met the Defendant in this case, Ivrin Bolden, in front of the Student Union Building across from Gunby Cafeteria. She met the Defendant in this case, and together they went to the Defendant's mini-warehouse on DeSiard Street in the 6000 block of DeSiard Street. Ivrin Bolden had a plan for Brenda Spicer. He had a plan for Brenda Spicer on the day she died. He planned to get Brenda out of his life. He planned to get Brenda away from Joel. He planned to get Brenda out of his hair because Brenda was a very close friend of Joel Tillis. Everywhere Brenda Spicer went, Joel Tillis was around. Everywhere Joel Tillis went, Brenda Spicer was around. They were a matched pair. They were the best of friends. And when Ivrin Bolden came to visit his girlfriend, Joel Tillis, Brenda Spicer was hanging around and he wanted to get Brenda away from the two of them. He wanted to get Brenda out of his hair. He wanted to get Brenda away from Joel so he could spend time with his girlfriend. So he came to Monroe on the day of the basketball game. He came to Monroe with a plan to kill Brenda Spicer, to get her out of the way, to get her away from his girlfriend so he could have his girlfriend, Joel Tillis, to himself. He had a plan. When he arrived on campus he met with Joel. He left Joel's room and he also met Brenda Spicer in front of the Student Union Building. Together they went to the mini-warehouse and here is where he executed his plan. He confronted Brenda Spicer, he strangled her, he forced her to have intercourse with him, he raped her vaginally and possibly anally, and left her for dead in the mini-warehouse. Now, Ivrin Bolden is very intelligent. He's a

college graduate. He made excellent grades at Northeast Louisiana and he realized he had to establish his alibi. He realized he had to cover his tracks so he wouldn't get caught. And the evidence will show that, after Ivrin Bolden killed Brenda Spicer, he left and went to the ball game. He went to Monroe Hall and picked up Joel Tillis' mother and Joel's younger sister and the other fans that came over to watch that ball game. And he went to the ball game like it was any other game . . . like it was any other day. He participated, he took pictures of everyone. It was nothing to him because he knew he had to act normal because he was creating his alibi, but in the back of his mind there was a body at the warehouse that he had to get out. There was a body of Brenda Spicer at the warehouse that he had to take out because he knew any minute now people were going to miss Brenda Spicer. She always went to the games. In fact, that's why she came to Monroe, to go to that ball game. So, at half time he slipped away at his first opportunity and he went to the warehouse, got Brenda Spicer's body, put it in his car, drove to Monroe Hall, passed in front of Strauss Hall, threw the body in the dumpster, turned to Monroe Hall, ran back to the coliseum to cover himself and he continued at the ball game just like nothing had happened. He talked to his friends, joked around, establishing his alibi. After the ball game was over he went to New Orleans, Louisiana. He went home. He had done just what he wanted to accomplish. He had accomplished everything he had set out. He intended to get his girl back. He planned to get Joel and Spicer away from each other. So, he killed Brenda Spicer to get his girlfriend back. Why did he do it? Because he was jealous. He was jealous of

the relationship that Brenda Spicer had with Joel Tillis. Joel looked at Brenda Spicer as a mother sometimes, as a big sister at others, as a friend when she needed it. And Ivrin was jealous. He was jealous of Brenda's relationship with Joel and he wanted to get Joel away from Spicer. He wanted Spicer out of the picture. He wanted his girlfriend back. When her body was found the next day, it was found in the dumpster, left for trash, left for dead because Ivrin Bolden considered Brenda Spicer trash. He wanted Spicer out of the way. Ladies and gentlemen, tomorrow morning you'll hear the witnesses in this case, you'll hear the evidence that the State's going to put on and I'd ask you all to pay close attention to the witnesses in the State's case, to watch their demeanor and their credibility when they testify at the witness stand because they'll tell you a tale of jealousy, of envy and of a man who wanted to get his girl back. He wanted to get Joel back from Brenda Spicer. He wanted his girl back from another girl. Thank you.

APPENDIX F

STATE OF LOUISIANA
VS. NO. 45,434
IVRIN BOLDEN, JR.

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

* * *

BE IT KNOWN AND REMEMBERED that upon Trial had in the above styled and numbered case in the Fourth District Court, Parish of Ouachita, State of Louisiana, on the 7th, 8th, 9th, 10th, 11th and 12th days of March, A. D., 1988, before Honorable James H. Boddie, Jr., Judge, at Monroe, Louisiana, the following proceedings were had, to-wit:

APPEARANCES: Ms. Kathy R. McCoy and Mr. C. Mark Donahoe, Assistant District Attorneys, Ouachita Parish, Monroe, Louisiana
Attorneys for the State

Mr. Edwin Greer, Attorney at Law, Shreveport, Louisiana
Attorney for the Defendant

* * *

[p. 17] going to see Ivrin." Well, how did Spicer know to see Ivrin to get something to give to Joel from storage? Because Ivrin called her and Joel's just not being truthful with us. Now, the Judge is going to instruct you in just a

minute that you can take anyone's testimony and disregard all of it or disregard a portion of it, if you think a person isn't telling you the truth. You can just . . . don't even believe all of it, you can believe just a portion of it. And I submit that you shouldn't believe Joel when she said, "I was with Ivrin for the whole time and I never saw him use the phone," because Joel has the most to gain, she gets her husband, she gets a doctor, she gets a good life. Mrs. Bates gets her A-OK son-in-law forever. Ivrin took an oath to tell the truth, he swore, raised his hand like everybody else did, he said I'm going to tell the truth, nothing but the truth and the whole truth, but did he tell you the whole truth or didn't he lie about some things? Didn't he tell you twice, I cooperated fully, anything the police wanted me to do, I did it, if they wanted me to give them a statement I gave it to them, they wanted to take my blood, I gave it to them. But when I asked him, didn't you have five lawyers? Didn't you have Mr. Piper represent you? Didn't you have Ben Jones represent you? And didn't Ben Jones and Mr. Piper tell you, "Don't talk to the police any more! Stop! Don't sign any more waivers"? What was his answer? His answer was yes. Ben Jones and Mr. Piper . . . in fact, he kind of fumbled around, said, "Oh, yeah, yeah, well they got together and then they told me well maybe I shouldn't talk to the police." That's why the police didn't go back and interview them, because Mr. Piper and Mr. Jones told the police, "Don't interview my client any more. He's a suspect in this case, we don't want you talking to him."

* * *

[p. 19] she could. And she did tell you what she did, so from March 5th, 5:30 to 6:30 there were no purchases for

one single item of film that cost $5.00, and that's what Ivrin Bolden said, that's Lie No. 2. He's already taken an oath, he's violated that oath, he's told you two lies. So when he says, "I didn't kill Brenda Spicer," why isn't he violating his oath a third time? When he says, "I didn't rape Brenda Spicer," why isn't he violating his oath a fourth time? He is, he's lying to you all, just like he lied about the K-Mart film, just like he lied about cooperating with the police, when he knew his lawyer, Ben Jones, one of five lawyers, told him, "Don't talk to the police, you're a suspect, don't sign anything, then they'll try to pin it on you, don't talk to the police." That's only logical that an attorney would advise someone of that anyway. Having listened to all the evidence, if you all reasonably believe in your mind that the defendant is guilty of second degree murder, you're bound by your oath as Jurors to find him guilty. The Judge is the person who imposes the penalty but you all are the persons who determine guilt or innocence. Thank you.

---

(2)

Supreme Court, U.S.
FILED
NOV 29 1994
OFFICE OF THE CLERK

No. 93-1126

94-613

In The

Supreme Court of the United States

October Term, 1994

IVRIN BOLDEN, JR.,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JERRY L. JONES
District Attorney
Fourth Judicial District
State of Louisiana
Counsel of Record

RICHARD P. IEYOUB
Attorney General
State of Louisiana

CHARLES L. COOK
Assistant District Attorney
Fourth Judicial District
P.O. Box 1652
Monroe, Louisiana 71210
318/388-4566

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 pp

QUESTION PRESENTED FOR REVIEW

I. Is it a violation of the collateral estoppel component of the Double Jeopardy Clause to subject a citizen to a perjury prosecution for denial of a murder after acquittal of the substantive charge when said citizen, subsequent to the acquittal, actually confesses to the murder he denied while under oath during the previous trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING CERTIORARI 6

I. The decision below that allows a perjury prosecution after acquittal of one charge when the State has obtained new and additional evidence that was not previously available to it indicating that the defendant testified falsely under oath during the former trial, is based upon sound legal reasoning 6

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Allen v. United States, 194 F. 664 (4th Cir. 1912) 11

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) 10, 11

Briddle v. Illinois, 450 U.S. 986, 101 S.Ct. 1527, 67 L.Ed.2d 823 (1981) 7

Commonwealth v. Peluso, 393 A.2d 344 (Pa. 1978) 8

Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990) 10

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) 10

Sealfon v. U.S., 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed.180 (1948) 7

State v. Bolden, 639 So.2d 721 (La. 1994) 5

State v. Elsby, 416 So.2d 60 (La. 1982) 6

Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972) 7

United States v. Nash, 447 F.2d 1382 (4th Cir. 1971) 11

United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) 10

CONSTITUTIONAL PROVISION:

U.S. Const. Amend. V 1

STATUTE:

LSA-R.S. 14:123 2

No. 93-1245

In The

Supreme Court of the United States

October Term, 1994

IVRIN BOLDEN, JR.,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of Louisiana, Respondent, respectfully prays that a writ of certiorari to review the judgment and opinion of the Supreme Court of Louisiana in this case. be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

LSA-R.S. 14:123 states:

Perjury is the intentional making of a false written or oral statement in, or for use, in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to a matter material to the issue or question in controversy.

It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

STATEMENT OF THE CASE

The defendant, Ivrin Bolden, Jr., was indicted, by a Ouachita Parish Grand Jury, for the murder of Brenda Spicer. He was tried during the month of March 1988. He was acquitted for the charge of murder.

During the course of the trial, Bolden testified as follows:

Q. Did you meet Brenda Spicer at the storage locker on March 5th?

A. No, I did not at any time that day.

Q. The only time you saw Brenda Spicer is when she gave you that camera and the $5.00?

A. I saw her earlier in the dorm and the last time I saw her was at the intersection when she gave me the camera.

Q. Did you have any kind of physical struggle or contact with Brenda Spicer that day?

A. No, I didn't have any contact with her at all physically.

Q. Did you have any kind of sexual intercourse with Brenda Spicer?

A. Never did.

Q. You never have?

A. No, I haven't.

Q. Did you kill Brenda Spicer on March 5th?

A. No, I did not.

In April 1991, Bolden was interviewed by authorities of the Burlington County Prosecutor's Office, New Jersey Homicide Unit and by Sergeant Tim Cook of the Memphis, Tennessee Police Department. Bolden was suspected of the murder of his former girlfriend, Joel Tillis. Tillis' body was located in the State of Arkansas. She had lived in Tennessee. The authorities were not certain in which jurisdiction she was killed.

The interview was primarily conducted in regard to the death of Joel Tillis; however, the Spicer murder was discussed as follows:

Q. Other than Joel Tillis, who is the other girl that you killed?

A. Brenda Spicer.

Q. And what were the circumstances surrounding the death of Brenda Spicer?

A. I don't know, she, she made me mad too, I guess. I was, I always wanted to be with whatever girl I am, I always wanted to be, have some attention with them, and just be with them without somebody else, I guess getting some of her attention. Joel seemed to always give her a lot of attention and, with, you know, with me around, and I didn't like that. I tried to, you know, talk to her, talk to Joel about it, and you know, ask her about it, but she kept on.

Q. What were the circumstances surrounding the death of Ms. Spicer?

A. I went, um, I asked her to come to like, we had a storage unit, and I asked her to come there with me and then I was trying to talk to her, you know, I had been asking her and asking her to, you know, try to give me some time with Joel and she just, you know, she just kept saying that she was going to be with Joel no matter what, and so I just, I got mad with her and I strangled her.

Q. And where did this take place at, the storage area?

A. Yeah.

Q. And where was the storage located?

A. Not far from the college campus in Monroe, Louisiana.

Q. And after you strangled her, what did you do?

A. Took her body back to the campus and put in the dumpster and went back to, to, went back to the game or I went back to the dorm or something.

Subsequent to the aforementioned statement, the Monroe Police authorities learned that Bolden had confessed. Bolden was extradited from New Jersey to Tennessee. He subsequently pled guilty to manslaughter for the death of Joel Tillis. After the disposition of Bolden's Tennessee charge, and subsequent to a perjury warrant being issued in March 1992, by the Fourth Judicial District Court, extradition papers were prepared for Bolden's return to Ouachita Parish. He waived extradition to Louisiana.

Bolden filed several pre-trial motions, one of which is the instant motion to quash on grounds of collateral estoppel. The motion was denied by the Honorable Michael Ingram, Judge. Bolden applied for a writ to the Court of Appeal Second Circuit, State of Louisiana. Said writ was denied.

An application for supervisory writs was then filed with the Louisiana Supreme Court. On December 20, 1993, said court granted writs and set the matter for oral argument. Oral arguments were had in February, 1994.

On July 5, 1994, the Louisiana Supreme Court affirmed the judgment of the lower courts. *State v. Bolden,*

639 So.2d 721 (La. 1994). The Court held that Petitioner's present prosecution for perjury was not barred.

REASONS FOR DENYING CERTIORARI

I. THE DECISION BELOW THAT ALLOWS A PERJURY PROSECUTION AFTER ACQUITTAL OF ONE CHARGE WHEN THE STATE HAS OBTAINED NEW AND ADDITIONAL EVIDENCE THAT WAS NOT PREVIOUSLY AVAILABLE TO IT INDICATING THAT THE DEFENDANT TESTIFIED FALSELY UNDER OATH DURING THE FORMER TRIAL, IS BASED UPON SOUND LEGAL REASONING.

Contrary to Petitioner's assertions, the State of Louisiana is not now seeking to litigate, for a second time, his alleged involvement in the murder of Brenda Spicer. The State is seeking to litigate the issue of whether Petitioner lied under oath during said trial.

The Louisiana Supreme Court, in *State v. Elsby*, 416 So.2d 60 (La. 1982), held that when the State attempts to prove a perjury charge based upon a sworn and an unsworn statement, it is required to present sufficient evidence from which a jury may perhaps infer that the statement given under oath was indeed the false statement. Specifically, the Court held that:

> "the State was required to prove beyond a reasonable doubt that the defendant knowingly made a false statement . . . It [is] not sufficient to show merely that the statement under oath was inconsistent with [the] unsworn statement to police." Id. at 61, 62.

The crux of Petitioner's argument is that a previous jury has determined that he did not kill Brenda Spicer; consequently, regardless of any new evidence beyond that adduced at his previous trial, the State cannot now try him for perjury for having lied at that trial.

The Petitioner cites many cases in support of his argument; however, none of the cited cases involve circumstances analogous to those presented by the instant case. None of the cases deal with the proposition of a defendant who is tried for one crime, testifies at trial that he did not commit the crime, is acquitted, and then subsequently admits that he did indeed commit the crime for which he was acquitted.

Briddle v. Illinois, 450 U.S. 986, 101 S.Ct. 1527, 67 L.Ed.2d 823 (1981) involved a case in which the defendant was charged with speeding in the initial trial. Immediately after trial and based upon no evidence other than the initial evidence presented at the first trial and the defendant's testimony, he was tried for perjury and obstruction of justice.

In *Sealfon v. U.S.,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948) the Court addressed the issue of whether an acquittal of conspiracy to defraud the government could preclude a subsequent prosecution for the substantive offense.

Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972) involved a case in which the defendant was tried for murder and acquitted. Subsequently, he was charged with robbery arising out of the same facts and circumstances.

Commonwealth v. Peluso, 393 A.2d 344 (Pa. 1978), cited by the defendant, contained a note alluding to the fact that additional evidence at a later trial makes no difference for collateral estoppel analysis; however, that case, although involving a collateral estoppel issue, is not on point with the facts of the instant case.

Collateral estoppel is a jurisprudentially created principle. Neither the U.S. Constitution nor the Louisiana Constitution mentions the principle. The Courts, through the years, have created the principle and held that the principle is embodied in the constitutional prohibition against double jeopardy.

The State-herein agrees with the principle. It is a sound principle assuming it is properly applied. The State understands the application of collateral estoppel in situations in which the State attempts to re-try an individual for charges arising out of the same factual basis as the previous trial or in situations in which the State attempts to try an individual for perjury using nothing more than the evidence adduced at the first trial and the defendant's testimony at the first trial.

It is incomprehensible to believe that the State should be precluded from prosecuting a defendant, previously acquitted for murder, for perjuring himself by denying that he committed the murder and then subsequently confessing to the murder.

The State-herein did not attempt to charge Bolden immediately subsequent to his acquittal for murder. It was not until four years later after he confessed to the murder that he previously denied, did the State bring perjury charges.

The State submits that to allow a defendant to lie in one trial that he did not murder a human being, subsequently say that he did indeed commit the murder and then escape trial for perjury, would do violence to our system of criminal justice.

Such a situation would allow a defendant simply because he was a convincing liar and obtains an acquittal, to walk directly out of the courthouse and immediately admit to the murder and escape prosecution for perjury. This would be akin to a grant of absolute immunity. Surely, the principle of collateral estoppel is not so far reaching as to allow one to make a mockery of our criminal justice system.

If this Honorable Court were to adopt the defendant's position, the only person to whom the perjury statute would apply would be those convicted in the previous trial and those who swear under oath, yet are not actually on trial themselves.

The perjury statute is a unique creature unto itself. The statute expressly provides a more severe penalty for perjury committed during a trial of any felony. Does the statute penalize only those persons listed above or does it penalize anyone who lies during the course of said trial?

An oath is administered to everyone who testifies at a trial. That oath must stand for something! The State submits that it stands for the proposition that any person who takes the oath must testify truthfully or be subject to prosecution for perjury. The oath or affirmation itself makes the perjury statute unique. Were it not for said oath or affirmation the provisions of the perjury statute could not be invoked.

This Honorable Court in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) has said that the principle of collateral estoppel should be applied with realism and rationality. Surely, reality does not dictate that it would be rational to believe that a person who denies that he committed a murder, and then subsequent to acquittal admits that he did indeed commit the murder, should be allowed to escape prosecution for perjury.

Further, if collateral estoppel can be applied to prohibit a perjury prosecution under those circumstances, one must question if application of the perjury provisions, to other persons to whom an oath is administered, would be a denial of equal protection. The only distinction is that one person has been tried for an unrelated crime and the others have not.

The Petitioner reads the holding of *Ashe, supra,* in an unwarranted broad sense. Heretofore, this Honorable Court has held that acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof. See *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) and *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 235, 93 S.Ct. 489, 492, 34 L.Ed.2d 438 (1972).

Further, in *Dowling v. United States,* 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990), while addressing the issue of admissibility of other acts evidence pursuant to Federal Rule of Evidence 404(b), this Honorable Court stated:

> "[W]e decline to extend *Ashe v. Swenson* and the collateral estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." Id. 110 S.Ct. at 672.

This Court further stated:

> "[W]e find no merit in the Third Circuit's holding that the common-law doctrine of collateral estoppel in all circumstances bars the later use of evidence relating to prior conduct which the government failed to prove violated a criminal law."

Although in dicta, several cases, as noted by the Louisiana Supreme Court, have suggested that when the government produces new and additional evidence that a defendant lied under oath at his first trial sufficient to permit the trier of fact to conclude beyond a reasonable doubt that perjury has been committed, the doctrine of collateral estoppel does not bar a prosecution for perjury. *United States v. Nash*, 447 F.2d 1382 (4th Cir. 1971) (Winter, J. concurring); *Allen v. United States*, 194 F. 664 (4th Cir. 1912).

In essence, the aforementioned cases indicate that the holding of *Ashe v. Swenson* would not preclude a perjury prosecution against a person such as the Petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Louisiana Supreme Court has not set a dangerous precedent. It is clear that being confronted with a factual situation never heretofore directly addressed by itself or this Honorable Court, the Louisiana Supreme Court applied the rule of collateral estoppel with realism and rationality in order to prohibit a person such as the Petitioner, from making a mockery of our criminal justice system. The State of Louisiana respectfully requests that this Honorable Court deny this petition for certiorari.

Respectfully submitted,

JERRY L. JONES
District Attorney
Fourth Judicial District
State of Louisiana
Counsel of Record

RICHARD P. IEYOUB
Attorney General
State of Louisiana

CHARLES L. COOK
Assistant District Attorney
Fourth Judicial District
Monroe, Louisiana